STRATEGY RESEARCH PROJECT

NATIONAL SOVEREIGNTY AND THE INTERNATIONAL CRIMINAL COURT

BY

COMMANDER DONALD J. BOLAND
United States Navy

USAWC CLASS OF 1999

U.S. ARMY WAR COLLEGE, CARLISLE BARRACKS, PA 17013-5050

USAWC STRATEGY RESEARCH PROJECT

National Sovereignty and the International Criminal Court

by

Donald J. Boland
United States Navy

Martin L. Cook
Project Advisor

U.S. Army War College
CARLISLE BARRACKS, PENNSYLVANIA 17013

ABSTRACT

AUTHOR: Donald J. Boland

TITLE: National Sovereignty and the International Criminal Court

FORMAT: Strategy Research Project

DATE: 12 February 1999 PAGES: 52 CLASSIFICATION: Unclassified

The International Criminal Court (ICC) is intended to be a permanent institution with the power to exercise jurisdiction over individuals for the most serious crimes of international concern: genocide, war crimes, and crimes against humanity.

However, as written, the statute creating the court reduces the sovereignty of nations in its pursuit of protecting international human rights.

This paper looks at the history leading to the formation of the ICC and the rise in stature of non-governmental organizations (NGOs) in protecting the humanitarian rights of victims of armed conflict. Their importance is significant given their success at the Rome Conference that established the ICC.

The effects and impact of the ICC statute on the sovereignty of the United States is reviewed. The paper concludes with options and recommendations on how the United States should proceed concerning the ICC.

TABLE OF CONTENTS

ABSTRACT iii

LIST OF TABLES vii

PROLOGUE 1

THE NUREMBERG PROMISE 3

THE ROAD TO ROME 7

THE ROME CONFERENCE 11

THE STATUTE 17

NATIONAL SOVEREIGNTY ISSUES 25

EPILOGUE - THE ROAD AHEAD 31

ENDNOTES 37

BIBLIOGRAPHY 41

LIST OF TABLES

Table 1 13

Table 2 17

PROLOGUE

A signal will come across even more loudly and clearly if nations all around the world who value freedom and tolerance establish a permanent international court to prosecute, with the support of the United Nations Security Council, serious violations of humanitarian law.

— President Clinton[1]

The scene is grisly. Scattered across a Kosovo hillside and heaped together in a muddy gully, the mutilated bodies of 45 Albanians were found. Some of the dead had their eyes gouged out; some had their heads smashed in. One man lay decapitated in the courtyard of his compound. The victims included a twelve-year-old boy and a young woman. Many had been shot at close range. Residents stated that the Serb forces had rounded up the men, driven them up the hill and shot them. Twenty-eight bodies lay heaped together at the bottom of the muddy hillside gully. All of the victims were dressed in civilian clothing. They did not appear to be rebels of the Kosovo Liberation Army.[2]

This is just one of the many atrocities that have occurred to countless innocent victims since the end of World War Two, the establishment of the United Nations, and the ratification of a multitude of conventions designed to protect civilian and military personnel from unnecessary

violence. This example occurred in January 1999 during the ongoing unrest in Kosovo, Serbia.

In July 1998, formation of an International Criminal Court was approved when the treaty won approval by a vote of 120-7, with 21 abstaining.[3] It will be a permanent institution that shall have the power to exercise jurisdiction over persons for the most serious crimes of international concern. It will complement national criminal jurisdiction.[4] The vision for this court is to bring the guilty to justice, and to serve as a deterrent for future crimes.

However, as currently written, the Court may reduce the sovereignty of nations in its pursuit of protecting international human rights. Should the United States, which has a long history of advocating human rights, ratify this treaty and surrender part of its sovereignty to further the protection of human rights? How have non-governmental organizations (NGO) increased in stature and importance on this issue to the point where they are a peer to the traditional state? Will the threat of prosecution by this court inhibit pursuit of national interests? These are some of the issues that will be addressed while investigating the establishment of the International Criminal Court (ICC).

THE NUREMBERG PROMISE

The wrongs which we seek to condemn and punish have been so calculated, so malignant, and so devastating, that civilization cannot tolerate their being ignored, because it cannot survive their being repeated.

— Chief U.S. Prosecutor Robert Jackson at Nuremberg[5]

While the most recognized historically, the International Military Tribunals at Nuremberg and Tokyo were not the first. By all accounts, the first known instance of an international trial for war crimes occurred in Breisach, Germany in 1474. Here, twenty-seven judges of the Holy Roman Empire sat in judgement of Peter van Hagenback for allowing his troops to rape, murder, and pillage.[6]

The decision to bring German and Japanese war criminals to trial at the end of the war was not a forgone conclusion. At the end of World War I, while the British favored bringing the Kaiser and other Germans to trial, the United States opposed having international law taking precedence over domestic laws. In the end, Word War I allies left it to Germany to prosecute its own war criminals.[7]

As World War II came to a close, harsh action was discussed. Winston Churchill favored summary execution of top Nazi criminals, while Stalin proposed that as many as

50,000 German officers be shot.[8] However, Franklin Delano Roosevelt favored less drastic action and supported trials. Harry Truman maintained this support after Roosevelt died and eventually, the British dropped their opposition and the trials were held.

The legacy of the Nuremberg and Tokyo trials is mixed. Some argue that the International Military Tribunals were a victor's justice. The Allies, having just won the war, were able to hold the leaders of the defeated nations accountable to standards that Allies did not apply to themselves. The trials have also been criticized for a variety of other reasons. Generally, however, the opinion is favorable for the attempt made by the Allies to bring some form of international judicial accounting for the horrors of the Axis powers.[9]

In either case, the persons brought to trial were accused expressly of offences against the laws and customs of war codified in the 1899 and 1907 Hague Regulations and the 1929 Geneva Conventions.[10]

An analysis of these war crime trials shows that the laws of war that had developed since the early ages of warfare between nations were still valid. Those brought to trial were accused of violations of the Hague conventions, dealing largely with the methods and means of combat.

Additional charges were brought for crimes against peace through the planning and execution of an aggressive war. Violations of the Geneva Conventions, focusing on the protection of victims, were also prosecuted, increasing the emphasis on international human rights and crimes against humanity. It is important to note that while the war was conducted between nations, individuals were brought to trial and convicted. This resulted in individuals being held responsible for their actions in war.

With the end of the war and the bringing to justice of the perpetrators of horrific crimes, the newly established United Nations set out to deter further devastating conflict and work towards peaceful coexistence. Conventions to protect people in future conflicts were developed and ratified in 1948 and 1949. In 1948, the International Law Commission (ILC), a UN General Assembly body, was directed to codify the Nuremberg principles and to prepare a draft statute creating an international criminal court. By the early 1950s, the ILC had produced two draft statutes, but with the political climate of Cold War, the project and the two drafts were shelved.[11]

Nuremberg had not fulfilled its brightest promise -- a permanent international tribunal for war crimes. The final business of Nuremberg remained unfinished.

THE ROAD TO ROME

The establishment of an International Criminal Court will ensure that humanity's response will be swift and will be just.

— Kofi Annan[12]

Despite the euphoria of the victory over the Axis powers and the promise of a new world order with the United Nations, the reality of the next fifty years is that the face of war and its players changed.

Wars between states gave way to armed conflict and skirmishes between proxies of the world superpowers. Newly established republics, formed during the break-up of former colonial empires such as the British and French, struggled to fill the power vacuum and become stable governments. In these struggles, sometimes with the support of the world superpowers, internal conflicts developed which were just as deadly as the global conflict of the early 1940s. Ideology, revolution, counter-revolution, national and ethnic sentiments were many of the sources that fueled these conflicts.[13]

There are four other facets of armed conflict that are representative of this period.[14] They are:

- Sophisticated modern weapons, such as assault weapons, high explosives and landmines are readily available to any party in a conflict.
- Terrorism has become commonplace, and has been used by both government leaders and other political manipulators.
- Refugees represent another complication in contemporary armed conflict. Numerous humanitarian organizations have formed just to support and relieve these refugees of their suffering.
- Contemporary armed conflicts are no longer "solved" with superior force. Because of politics and law, they are left to fester in longstanding hostile relationships.

As a result of the widespread suffering of millions of people and the perception that nations were incapable of ending the conflicts that brought about this suffering, a wide array of non-government (NGO) and private volunteer organizations (PVO) took up the mantle to care for the countless victims. Organizations such as the International Committee of the Red Cross (ICRC) rose in stature as non-state political parties or actors. In a number of cases,

they achieved more than the nations achieved[15]. These NGOs and PVOs became vocal, bringing to the public eye the suffering of the victims. They conducted extensive investigations and demanded that those guilty of atrocities be brought to justice. If individuals had been held accountable for crimes against humanity after World War II, why not hold them accountable now?

After countries that had been embroiled in armed conflict stopped fighting, the question of how to resolve criminal misconduct loomed. Various methods were tried with little success. Internal investigation or truth commissions were conducted to acknowledge the suffering of the victims and to hold accountable the guilty people. In some cases, punishment was handed down and in other cases the reported perpetrator was publicly disgraced, whether he was actually guilty or not.[16]

In a large number of countries, before a ruler peacefully stepped down to allow a transition to a different government, wholesale amnesty was granted to preclude future punishment.[17] Only in rare cases did a new government actually punish the criminal behavior that had occurred during armed conflict.[18]

With the ceaseless conflict worldwide and its associated suffering, the NGOs and PVOs worked to highlight

the suffering and set in motion a call to action from the nation-states. Their efforts were aided by a number of events:

- Dramatic ethnic cleansing and vast suffering was shown on nightly news from Sarajevo and the former republic of Yugoslavia.
- Genocide in Rwanda, with millions of refugees attempting to escape that violence, captured the interest of the press and social groups.
- The end of the Cold war and its associated superpower split was no longer an inhibitor to the effective operation of the UN Security Council.

In an effort to stop the suffering and hold people accountable, the UN Security Council established the International Criminal Tribunal for the Former Yugoslavia and for Rwanda. The catalyst had been the NGOs and PVOs and their advocacy of International Humanitarian Law. The march towards a permanent International Criminal Court had begun.

THE ROME CONFERENCE

> It is a great historic event. It's almost the culmination of an idea for which I was mocked and ridiculed for years. But we've got to build a world of law.
>
> — Benjamin Ferencz, Nuremberg Prosecutor[19]

The United States has long been a champion of human rights. We have played a pivotal role in the international community's support for the Yugoslav Tribunal and its predecessor, the Commission of Experts on the Former Yugoslavia. The U.S. has provided $54 million dollars in assessed payments and over $11 million in voluntary contributions. U.S. troops in Bosnia have played significant roles, either directly or in support capacities, in the apprehension of at least five indictees.[20] Our contribution to the Rwanda Tribunal is comparable. Therefore, it could be expected that the United States' efforts would be extensive in developing the permanent International Criminal Court. They were.

The Rome Conference, held in June-July 1998, was the culmination of eight years of effort by the International Law Commission and the associated Preparatory Committee to finalize a statute that would meet the need for justice. A daunting effort, the statute had to meet the wide and varied requirements of over one hundred fifty countries.

The U.S. delegation included personnel from the Department of State and Justice, Office of the Secretary of Defense, the Joint Chiefs of Staff, the U.S. Mission to the United Nations, and the private sector.[21]

The success of the conference in achieving widespread consensus on the statute was remarkable. However, the surrounding international politics and anti-U.S. climate foreshadow a gloomy future for the United States in the international arena.

The first noteworthy aspect of the Conference was the "enormous influence of NGOs inside the conference."[22] NGOs were given unprecedented access and privileges and accorded a status almost on a par with official state delegations. Acting as lobbyists, they remonstrated, cajoled, and chastised the assembled plenipotentiaries to adopt NGO positions. Delegates were flooded with NGO briefing papers, reports, resolutions and press reports.[23] They advocated human rights and International Humanitarian Law. They argued for larger jurisdiction and more power for the Court. Clearly, the NGOs had a plan that sought to advocate their goals. Judging by the results, they were highly successful.

Participating Parties at Rome Conference

GOVT or State Party	Total	Non-State Party	Total
		Intergovernmental Organizations	16
Nations	161	Specialized Agencies	5
		UN agencies	8
Organization	1	NGOs	129
Total	162	Total	158

Table 1

A second aspect of the conference illustrates the United States' interaction in the international community. The character of the statute was definitely shaped by the United States as illustrated in the partial list of objectives achieved by the U.S. delegation:[24]

- National security information, which might be requested by the court, does not have to be released if a nation requires it to remain protected.
- Defendants and suspects will be provided important due process protections.
- Each crime and its associated elements must be clearly defined and documented.

- To ensure that a nation could take the first action, an improved regime of complementarity (meaning deferral to national jurisdiction) was included.
- Judges are required to meet rigorous qualifications prior to their selection.

While these successes are noteworthy, review of a Joint Staff point paper illustrated that there were interagency disputes regarding the U.S. position on how thoroughly the statute should protect U.S. troops from prosecution. These disputes were never resolved and this later undermined the U.S. negotiating effort. However, the same Deputy Committees meeting that decided not to pursue the one hundred percent protection of U.S. service members (the one hundred percent protection position was strongly advocated by the Joint Chiefs of Staff) did authorize the Department of Defense (DoD) to discuss its principal ICC concerns with foreign military counterparts.

The Pentagon called in more than one hundred foreign military attaches to brief them on their concerns over the ICC.[25] A senior team was also sent to Europe familiarizing top military brass in each capital of the U.S. argument. Pentagon concerns included these:

- Unlike most treaties, this treaty directly affects individual troops as well as governments. The delegations should modify the ICC statute to provide protection for troops and commanders from inappropriate investigation and prosecution.
- Jurisdiction issues need to be resolved so that the ICC is not a vehicle that interferes with responsible nations that have demonstrated the ability to investigate and discipline their own service members.
- The court should have jurisdiction over genocide, war crimes and crimes against humanity, but not aggression.

The press and NGOs quickly picked up on this tactic of working military to military contacts and countered with their own information efforts.[26]

As the conference neared its completion, U.S. tactics became more aggressive, causing some to charge us with using "bully tactics". When Germany and South Korea were lobbying for "universal jurisdiction" for the court, sources reported that U.S. Secretary of Defense William Cohen threatened these countries with reconsidering troop deployment in those countries.[27] During the waning days of the conference, Secretary General Kofi Annan criticized the

U.S. and nine other countries for taking uncompromising positions in the eleventh hour negotiations.[28] Despite heavy lobbying and aggressive action by the U.S., the lone remaining superpower's efforts were not as successful as those of the NGOs.

The final aspect of the conference illustrates two key facts of the international arena today. The strength and power to call the shots amongst its allies, once enjoyed by the U.S., has decreased. Second, a diverse group of states from the developed and developing world have formed a broad coalition, known as the "like-minded group", to work for an independent and effective court, as they had done in developing an international landmine treaty. Nations can work together to achieve results despite our objections and, on any given day, our strongest allies may be part of that group. This is part of a trend in treaty making, unacceptable to the U.S., where the U.S. is bypassed via majority voting.

In the end, the treaty won final approval. The United States joined Libya, Algeria, China, Israel, Qatar, and Yemen in opposing the treaty. The statute will enter into force once sixty states ratify it. It is anticipated that this will not occur until the year 2000 or later.

THE STATUTE

I won't say that we gave birth to a monster, but the baby has some defects.

— Gam Strijards, Netherlands delegate to Rome[29]

The Statute for the International Criminal Court consists of one hundred twenty eight articles divided into thirteen parts.

Breakdown of ICC Statute

Establishment of the Court	Art 1-4
Jurisdiction, Admissibility, & Applicable Law	Art 5-21
General Principles of Criminal Law	Art 22-33
Composition & Administration of the Court	Art 34-52
Investigation and Prosecution	Art 53-61
The Trial	Art 62-76
Penalties	Art 77-80
Appeal and Revision	Art 81-85
International Cooperation & Judicial Assistance	Art 86-102
Enforcement	Art 103-111
Assembly of State Parties	Art 112
Financing	Art 113-118
Final Clauses	Art 119-128

Table 2

For the purpose of this paper, only those articles[30] that were contentious and not resolved to the satisfaction of the United States will be reviewed. The U.S. viewpoint[31] will be discussed followed by the majority view that was accepted in the treaty, advocated by the NGOs or like-minded countries.[32] The next chapter will address those issues that would act to reduce the sovereignty of the nation-states.

Article 5 - Crimes within the jurisdiction of the court: The Court will have jurisdiction over the crimes of genocide, crimes against humanity, war crimes, and the crime of aggression.

U.S. view: The U.S. agreed to accept the ICC having automatic jurisdiction over the crime of genocide. They also recommended a ten-year transition period, following entry into force of the statute, during which time any state could "opt-out" of the Court's jurisdiction for crimes against humanity or war crimes. The transition period allows for an evaluation of the court's performance. If the court proved itself, a nation would allow automatic jurisdiction over these two additional crimes. If the court was not living up to expectations, a nation could decide to withdraw from the treaty. The crime of aggression should not be included in the statute until it

is clearly defined, with that definition showing how it would charge an individual with criminal responsibility. The U.S. felt the UN Security Council would have to declare that a nation had committed aggression before you could charge an individual with this crime.

Opposing view: The conference decided that when a state ratifies the treaty, it was accepting the courts jurisdiction over all crimes within its scope. A nation should not be allowed to pick and choose which crimes are applicable. However, it was decided that in conjunction with Article 124 there will be a one time transition period of seven years for a state to opt out of the jurisdiction for war crimes. The seven-year period is to allow states to change their national law or policy to conform to the provisions of the statute. The court will have jurisdiction over the crime of aggression, per Articles 121 and 123, after the crime is clearly defined and reviewed at the first review conference scheduled seven years after the statute enters into force.

Article 12 - Preconditions to the exercise of jurisdiction: The court may exercise jurisdiction if one or more of the following States are Parties to the statute:

- The State on the territory where the conduct in question occurred or, if the crime was committed on

a vessel or aircraft, the State of registration of that vessel or aircraft (i.e. the state where it happened).

- The State where the person accused of the crime is a national (i.e. the state that owns the accused).

U.S. view: As written, even if a nation did not sign the treaty, the court could have jurisdiction over that non-party state and thereby be able to bring one of its nationals to trial. The fear here was that if the U.S. committed a perceived crime, for example in Italy (which has signed the treaty), the ICC could claim jurisdiction of the accused U.S. individual, even if the U.S. did not sign the treaty. The U.S. sought an amendment that would have required both of the states discussed above to be a party to the treaty or, at a minimum, would have required that consent be obtained from the nation where the accused claims his nationality (i.e. the U.S. in the example above). Overall, the U.S. goal was to provide language in the statute that would ensure one hundred percent protection for U.S. military personnel, especially those deployed overseas. With the U.S. as the lone remaining superpower, which frequently takes action against hostile entities, the U.S. fears that nations will conspire to bring U.S. military personnel to trial for these acts.

Opposing view: Even as written, these preconditions are impediments to the court's ability to make a difference in the real world. These preconditions are viewed as loopholes that could preclude prosecutions for crimes conducted during internal conflicts in non-party states. For example, if Serbia does not sign the treaty and then commits genocide within its borders, as written, the ICC does not have jurisdiction unless the UN Security Council gets involved.

Article 15 - Prosecutor: The Prosecutor may initiate investigations *proprio motu* (self-initiating) on the basis of information of crimes committed that are within the jurisdiction of the Court. If the Prosecutor concludes that there is a reasonable basis to proceed with an investigation, he/she must convince a majority of the three Pre-Trial Chamber judges that the case merits further investigation.

U.S. view: These self-initiated investigations do not require any referral from a state party or the UN Security Council. This clause provides the Prosecutor with too broad a range of power, with few checks and balances. The U.S. concern is that this could result in overwhelming the court with complaints, risk diversion of its scarce

resources, as well as embroil the court in controversy, political decision making and confusion.

Opposing view: The majority feels that this self-initiating aspect is crucial in providing a court that is independent from the political ties and potential paralysis of the UN Security Council. This is an important aspect given a typical reluctance on the part of nations and the Security Council to refer situations to the court. These provisions also give the victims and survivors a role in the ICC process, by essentially enabling them to trigger investigations via the prosecutor.

Article 120 - Reservations: No reservations may be made to this Statute. Note: a reservation is a declaration made by a state by which it purports to exclude or alter the legal effect of certain provisions of a treaty.

U.S. view: This article precludes a country from signing the statute unless they are fully ready to support each article as written. The U.S. stated that, at a minimum, there were certain provisions of the treaty where constitutional requirements and national judicial procedures might require a reservation that did not defeat the intent or purpose of the treaty. The use of reservations allows a country to clarify its understanding of a treaty. For example, when the U.S. Senate approved

the Genocide Convention, the Senate attached two reservations, five understandings and one declaration.[33]

Opposing view: Any reservation, which would allow a state to opt out of a particular provision, would undermine the effectiveness of the treaty.

Two other Articles that discuss the operation of the court, and which have relevance to its effectiveness include:

Article 11 - Jurisdiction *ratione temporis*: The court will have jurisdiction only with respect to crimes committed after entry into force of the statute.

Article 1 - The Court: The court will be complementary to national criminal jurisdictions, unless the state is unwilling or genuinely unable to carry out the investigation (Article 18 also refers). National courts have the primary responsibility to bring a perpetrator to justice.

Finally, as discussed in the "Final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the establishment of an International Criminal Court", dated 17 July 1998, the following texts and proposals must still be drafted and agreed upon:

- Rules of Procedure and Evidence
- Elements of Crimes
- Relationship between the Court and UN
- Financial regulations and rules
- A budget for the first year
- Definition for Crimes of Aggression and its associated elements

While the Statute achieved overwhelming consensus, there is still much work to be done.

NATIONAL SOVEREIGNTY ISSUES

The U.N. is not now - nor will it ever be so long as I have breath in me - a sovereignty.

— Senator Jesse Helms[34]

The goal of the International Criminal Court is to investigate and bring to justice those perpetrators of horrific crimes against humanity. The focus of the treaty is on the individual. But in drafting the statute to bring individuals to justice, the statute acts to diminish a nation's sovereignty. This is unacceptable to the United States.

This section will address three aspects of the statute that impact on U.S. sovereignty.

Issue One: Complementarity. The ICC is not intended to replace the national courts. However, there are provisions in the statute that allow the ICC to second-guess the thoroughness of a state investigation or prosecution, as well as to require the state to provide status reports to the ICC. This places the ICC in a superior position over the state.

The Court is made aware of a crime that falls under its jurisdiction. For example, while conducting humanitarian operations and peacekeeping operations, some

civilians that are being used as human shields are shot by U.S. troops trying to defend themselves as occurred during the Somalia peacekeeping and humanitarian action. If this were brought to the court as a war crime, it would fall under the jurisdiction of the ICC. However, because of complementarity, the national court of the accused, the U.S., has the first line of accountability to investigate, and if warranted, prosecute. If the U.S. did investigate, the ICC could direct the U.S. to periodically inform them of the status of the investigation, in accordance with Article 18. However, while the circumstances are tragic, the U.S. decides not to investigate the issue further as it occurred while conducting a valid official action, peacekeeping. The Prosecutor for the ICC could determine that the U.S. was unwilling to investigate. If the prosecutor can convince a majority of the three pre-trial judges that there is a basis for the case, the ICC can then conduct the investigation.

Issue Two: Preconditions and Exercise of Jurisdiction. The intent of the ICC is to prosecute tyrants who commit mass murder against their own citizens, while at the same time not inhibiting states from contributing to efforts that help protect international peace and security.

However, the statute is written so that a peacekeeper could be brought to trial.

A state that is not party to the treaty launches a campaign of terror against a dissident minority inside its territory. Thousands of innocent civilians are killed. Since the alleged crime occurred in a non-party state, committed by a national of that state, the preconditions of Article 12 do not apply. The only thing that could be done is a prosecutor initiated investigation, which will not accomplish much as the tyrant will not surrender himself to the court. Since international peace and security are imperiled, the U.S. participates in a coalition to use military force and stop the killing. Unfortunately, in doing so, bombs intended for the military targets go astray. A hospital is hit. An apartment building is demolished. Some civilians are killed. The state responsible for the atrocities demands that the ICC prosecute U.S. officials and commanders.[35] If the U.S. had signed the statute, the precondition of Article 12 would be met, and the ICC would have jurisdiction to investigate the peacekeeping U.S. If the U.S. were not a signatory, the Prosecutor could initiate his own investigation in accordance with Article 15.

Overall, the U.S. has a number of concerns about what "triggers" an investigation and the impact of these concerns on conducting operations that support international security, our national interests and our national security. It does not matter whether we are a party to the statute or not, since the ICC can assert jurisdiction over non-party states. Will nations that did not sign the treaty, but typically deploy forces to support peacekeeping mandates, continue to do so if the ICC asserts that it has jurisdiction over acts of their soldiers? Will these assertions of jurisdiction and the threat of prosecutions make it more difficult to put together coalitions to conduct international peacekeeping and enforcement actions? Will every unilateral act by the U.S., such as the tomahawk cruise missile attack into Sudan and Afghanistan, result in a cry for an ICC investigation?

Issue Three: The U.S. Constitution. While heavily influenced by the U.S. delegation to the Rome Conference, the ICC statute falls short in a number of areas to meet the freedoms enjoyed by U.S. citizens in the Bill of Rights and the U.S. Constitution. In order to comply with the statute, the U.S. would either have to modify these documents to comply with the intent of the ICC, or violate a person's Constitutional rights.

The Sixth Amendment to the U.S. constitution states: "In all cases, the accused shall enjoy the right to a…trial by an impartial jury." The ICC recognizes no such right. Instead, the accused will face a panel of judges.

Former Justice Department officials Lee A. Casey and David B. Rivkin Jr. state that "punishment, up to a maximum sentence of life imprisonment, will be decided by the court, as will requests for clemency and parole. The sole venue for appeal will be the appellate division of the ICC itself. There is no recourse from their decisions and no ability to overturn the law it sets."

These are but a few of the legal concerns that are being expressed on the statute and its implications on the Constitution. Further analysis is ongoing. Needless to say, there is some concern as to whether the ICC statute violates the U.S. Constitution, further impacting on our sovereignty.

Opposing view: The human rights groups and the delegates would offer several responses to U.S. concerns over these issues. They include:

- The U.S. is paranoid. There are adequate checks and balances to prevent a politically motivated or unjust investigation against the U.S.

- By making the statute strong, it will deter aggression and even reduce the number of peacekeeping deployments.
- Should the benefit of eliminating the very last iota of risk of prosecution justify totally ignoring the cost to other interests by opposing the ICC?

Or maybe this diminished national sovereignty was the intent. Benjamin Ferencz, a prosecutor at the Nuremberg Trials expressed this view, when he told Rome Conference attendees that "antiquated notions of absolute sovereignty are absolutely obsolete in the interconnected and interdependent global world of the 21st century."[36]

EPILOGUE - THE ROAD AHEAD

> While I am relieved that the Administration voted against the treaty in Rome, I am convinced that it is not sufficient to safeguard our nation's interests. The United States must aggressively oppose this Court each step of the way, because the treaty establishing the International Criminal Court is not just bad, it is dangerous.
>
> — Senator Rod Grams[37]

The U.S. has some time. It will take at least two years before a sufficient number of countries ratify the treaty and the magic number of sixty is achieved, at which time the treaty will enter into force. But what will our course of action be?

One option is "benign neglect". This strategy calls for the U.S. to ignore the treaty and not actively oppose it. The treaty will likely die its own death due to lack of U.S. support. If by some chance it did get ratified in its current form, the U.S. can wait seven years until the next review conference and recommend changes at that point. While advocates of the ICC would rather have the U.S. sign the treaty, even if it is not ratified in Congress, a non-opposing option would be acceptable to them.

Option two is "aggressive opposition". The U.S. would seize the leadership role and aggressively oppose the treaty. Unless the treaty provides one hundred percent

protection for U.S. military personnel, as well as provide for basic Constitutional legal rights, the U.S. will fight ratification of the treaty and use bully tactics as necessary to dissuade other nations from ratifying it. Leverage that the U.S. has includes defense arrangements, stationing of forces, and other bilateral relations.

This option is the least desired by advocates of the ICC. These tactics would cause an outcry from all of the NGOs and other organizations that fought for the treaty. These organizations would portray the U.S. as a country not willing to be bound by international humanitarian law and would act to damage the moral dimension of U.S. international leadership. These organizations would fuel anti-American feelings.

The most likely option, and the solution that I would recommend, is to use the time available to influence and work for change. It must be stated openly that the U.S. will not sign the treaty in its present form, and that the advantages deriving from a strong support by the United States for the ICC should not be sacrificed for a concept of jurisdiction that runs the risk of dividing states on this issue. The U.S. must seize the leadership role and attempt to fix the statute before it enters into force. "The credibility of the court will be demonstrated in how

it builds its relationships with sovereign governments and in how well it supports, and is supported by, the requirements of international peace and security."[38] These actions will require a coordinated approach across all departments in the interagency process as well as a full court press at the highest levels.

The challenge will be that certain amendments unacceptable to the U.S. could remain very popular, and that changes supported by other nations, that had previously been defeated, could be reconsidered as well (such as the definition of aggression, and the crimes of terrorism and drug trafficking). This option will require a significant effort to get the statute in a form that supports U.S. requirements.

Other issues that need to be reviewed regardless of the option that is taken, include these:

- What level of participation should the U.S. delegation play in the remaining activities required to complete work on the treaty?
- Status of Forces Agreements must be renegotiated or new agreements must be considered. Status of forces agreements document the legal relationship between the armed services of the nation sending troops and the host nation. This agreement covers a number of

issues, but of importance is the policy for resolving jurisdictional issues.

- Extradition Agreements must be reviewed to ensure that they preclude a further turnover of an individual, extradited from the U.S., to the ICC.
- What steps are required in order to preserve Persistent Objector Status pending and after entry into force of the statute? Because sovereign autonomy is a fundamental principle of international law, a corollary doctrine has developed that a state that persistently objects to an emerging norm is not bound by the norm once it gains the status of customary international law.[39]
- What are the implications for peacekeeping missions and for troop stationing overseas?

Regardless of the outcome, there are additional actions that are required to ensure the protection of U.S. military personnel.

In the meantime, my forecast is that the U.S. will continue to promote human rights and bring to justice those who have committed the most horrifying of crimes. The U.S. will pursue efforts to bring to justice Yugoslavian war crimes perpetrators as demonstrated by their apprehension of a former Bosnian Serb police chief, Stevan Tordorovic[40],

and Bosnian Serb General Radislav Krstic[41]. And where they are needed, the U.S. will take the lead in establishing ad-hoc tribunals to investigate crimes of genocide and crimes against humanity, such as their current efforts to form a tribunal for the Khmer Rouge in Cambodia[42]. The price of peace is eternal leadership and vigilance.

WORD COUNT = 6035

ENDNOTES

[1] William J. Clinton, "Remarks at the Opening of 50 Years after Nuremberg: Human Rights and the Rule of Law", (presented at University of Connecticut, Storrs, CT. on 15 October 1995), White House.

[2] Melissa Eddy, "Kosovo Massacre Blamed on Serbs", Patriot News, 17 January 1999, Sec A., p. 16.

[3] Candice Hughes, "War Crimes Court Approved", 17 July 1998, available from <http://www.abcnews.com/sections/world/DailyNews/intlcourt980717.html>; Internet; accessed 10 September 1998.

[4] United Nations diplomatic Conference, *Rome Statute of the International Criminal Court*, 17 July 1998, Art 1.

[5] "The Trials Legacy", Court TV Library; available from <http://www.courttv.com/casefiles/nuremberg/legacy.html>; Internet; accessed 16 January 1999.

[6] Aryeh Neier, War Crimes: Brutality, Genocide, Terror, and the Struggle for Justice, New York: Times Books, 1998, 12.

[7] Ibid., 15.

[8] Ibid.

[9] "The Trials Legacy", Court TV Library.

[10] Geoffrey Best, War and Law Since 1945 (New York, Clarendon Press, 1994), 181.

[11] Gary P. Dempsey, "Reasonable Doubt, The Case against the Proposed International Criminal Court", 16 July 1998; available from <http://www.cato.org/pubs/pas/pa-311.html>; Internet; accessed 23 December 1998.

[12] Kofi Annan, "Establishment of an International Criminal Court", 17 July 1998; available from <http://www.un.org/icc/main.htm>; Internet; accessed 11 February 1999.

[13] Best, 214.

[14] Ibid., 217.

[15] Ibid., 228.

[16] Neier, 41.

[17] Ibid., 37.

[18] Ibid., 79.

[19] James Podgers, "War Crimes Court Under Fire"; ABA Journal, September 1998, 64.

[20] David J. Scheffer, "U.S. Policy on International Criminal Tribunal", (presented to Washington College of Law, American University, Washington, D.C. on 31 March 1998), USIA

[21] David J. Scheffer, "Developments Relating To The Establishment Of A permanent International Criminal Court" (statement presented before the Committee on Foreign Relations of the U.S. Senate on 23 July 1998), Department of State

[22] William Jasper, "Courting Global Tyranny", 31 August 1998; available from <http://jbs.org/tna/1998/vol14no18.htm>; Internet; accessed 23 December 1998.

[23] William Jasper, "Non-Governmental Organizations: The Pressure From Below"; 31 August 1998; available from <http://jbs.org/tna/1998/vol14no18.htm>; Internet; accessed 23 December 1998.

[24]. David J. Scheffer, "Developments Relating To The Establishment Of A permanent International Criminal Court" (statement presented before the Committee on Foreign Relations of the U.S. Senate on 23 July 1998), Department of State

[25] Eric Schmitt, "Pentagon Battles Plans For International War Crimes Tribunal", New York Times, 14 April 1998; Foreign Desk, p. 1.

[26] "Human Rights Watch Condemns Pentagon Lobbying on the International Criminal Court", 14 April 1998; available from <http://www.hrw.org/hrw/press98/aprl/pntg-1.htm>; Internet; accessed 23 December 1998.

[27] Alessadra Stanley, "U.S. Presses Allies To Rein In Proposed War Crimes Court", New York Times, 15 July 1998, Foreign Desk, p.1.

[28] Alessadra Stanley, "Annan Faults U.S. and (Other Lands in Debate on Court", New York Times, 14 July 1998, Foreign Desk, p.2.

[29] Jasper, "Courting Global Tyranny", 3.

[30] United Nations Diplomatic Conference, *Rome Statute of the International Criminal Court*, 17 July 1998.

[31] David J. Scheffer, "Developments Relating To The Establishment Of A permanent International Criminal Court" (statement presented before the Committee on Foreign Relations of the U.S. Senate on 23 July 1998), Department of State

[32] "Summary Of The Key Provisions Of The ICC Statute", linked from Human Rights Watch at "The Campaign to Establish an International Criminal Court (ICC)", available from <http://www.hrw.org/hrw/campaigns/icc/icc-statute.htm>; Internet; accessed 23 December 1998.

[33] Jasper, "Courting Global Tyranny", 3.

[34] Barbara Crossette, "Helms Vows To Make War On U.N. Court", New York Times, 27 March 1998, Foreign Desk, p.1.

[35] David J. Scheffer, "The International Criminal Court" (remarks presented before the 6th Committee of the 53rd General Assembly on 21 October 1998), Department of State

[36] Jasper, "Courting Global Tyranny", 10.

[37] Jasper, "Courting Global Tyranny", 10.

[38] Scheffer, "The International Criminal Court"

[39] Lynn Loschin, "The Persistent Objector and Customary Human Rights Law: A Proposed Analytical Framework" 1996, available from <http://www.planetex.com/lloschin/personal/jilp.html>; Internet; accessed 3 February 1999.

[40] Associated Press, "NATO forces Arrest Suspected War Criminal", 27 September 1998; available from <http://cnn.com/WORLD/europe/980927/war.crimes.arrest.ap.html>; Internet; accessed 27 September 1998.

[41] Associated Press, "NATO Arrests Senior Bosnian Serb General Wanted for Genocide", 2 December 1998; available from <http://cnn.com/WORLD/europe/9812/02/bosnia.arrest/index.html>; Internet: accessed on 02 December 1998.

[42] Philip Shenon, "U.S. Seeks War Crimes Trial of Top Khmer Rouge Leaders", New York Times, 5 January 1999 sec 1A, p.3.

BIBLIOGRAPHY

Annan, Kofi. "Establishment of an International Criminal Court", 17 July 1998. Available from <http://www.un.org/icc/main.htm>. Internet. Accessed 11 February 1999.

Associated Press. "NATO forces Arrest Suspected War Criminal", 27 September 1998. Available from <http://cnn.com/WORLD /europe/980927/war.crimes.arrest.ap.html>. Internet. Accessed 27 September 1998.

Associated Press. "NATO Arrests Senior Bosnian Serb General Wanted for Genocide", 2 December 1998. Available from <http://cnn.com/WORLD/europe/9812/02/bosnia.arrest/index.html>. Internet. Accessed 02 December 1998.

Best, Geoffrey. War and Law Since 1945 New York, Clarendon Press, 1994.

Clinton, William J. "Remarks at the Opening of 50 Years after Nuremberg: Human Rights and the Rule of Law". Presented at University of Connecticut, Storrs, CT. on 15 October 1995. White House.

Crossette, Barbara. "Helms Vows To Make War On U.N. Court", New York Times, 27 March 1998, Foreign Desk, p.1.

Dempsey, Gary P. "Reasonable Doubt, The Case against the Proposed International Criminal Court", 16 July 1998. Available from <http://www.cato.org/pubs/pas/pa-311.html>. Internet. Accessed 23 December 1998.

Eddy, Melissa. "Kosovo Massacre Blamed on Serbs", Patriot News, 17 January 1999, Sec A, p.16.

Hughes, Candice. "War Crimes Court Approved", 17 July 1998. Available from <http://www.abcnews.com/sections/world /DailyNews /intlcourt980717.html>. Internet. Accessed 10 September 1998.

"Human Rights Watch Condemns Pentagon Lobbying on the International Criminal Court", 14 April 1998. Available from <http://www.hrw.org/hrw/press98/aprl/pntg-1.htm>. Internet. Accessed 23 December 1998.

Jasper, William. "Courting Global Tyranny", 31 August 1998. Available from <http://jbs.org/tna/1998/vol14no18.htm>. Internet. Accessed 23 December 1998.

Jasper, William. "Non-Governmental Organizations: The Pressure From Below", 31 August 1998. Available from <http://jbs.org/tna/1998/vol14no18.htm>. Internet. Accessed 23 December 1998.

Loschin, Lynn. "The Persistent Objector and Customary Human Rights Law: A Proposed Analytical Framework", 1996. Available from <http://www.planetex.com/lloschin/personal/jilp.html>. Internet. Accessed 3 February 1999.

Neier, Aryeh. War Crimes: Brutality, Genocide, Terror, and the Struggle for Justice, New York: Times Books, 1998.

Podgers, James. "War Crimes Court Under Fire"; ABA Journal, September 1998, 64-69.

Scheffer, David J. "Developments Relating To The Establishment Of A permanent International Criminal Court". Statement presented before the Committee on Foreign Relations of the U.S. Senate on 23 July 1998. Department of State.

Scheffer, David J. "The International Criminal Court". Remarks presented before the 6th Committee of the 53rd General Assembly on 21 October 1998. Department of State.

Scheffer, David J. "U.S. Policy on International Criminal Tribunal". Presented to Washington College of Law, American University, Washington, D.C. on 31 March 1998. USIA.

Schmitt, Eric. "Pentagon Battles Plans For International War Crimes Tribunal". New York Times. 14 April 1998. Foreign Desk, p. 1.

Shenon, Philip. "U.S. Seeks War Crimes Trial of Top Khmer Rouge Leaders". New York Times, 5 January 1999 sec 1A, p.3.

Stanley, Alessadra. "U.S. Presses Allies To Rein In Proposed War Crimes Court". New York Times. 15 July 1998. Foreign Desk, p.1.

Stanley, Alessadra. "Annan Faults U.S. and 9 Other Lands in Debate on Court", New York Times. 14 July 1998 Foreign Desk, p.2.

"Summary Of The Key Provisions Of The ICC Statute". Linked from Human Rights Watch at "The Campaign to Establish an International Criminal Court (ICC)". Available from <http://www.hrw.org/hrw/campaigns/icc/icc-statute.htm>. Internet. Accessed 23 December 1998.

"The Trials Legacy", Court TV Library. Available from <http://www.courttv.com/casefiles/nuremberg/legacy.html>. Internet. Accessed 16 January 1999.

United Nations Diplomatic Conference. *Rome Statute of the International Criminal Court*, 17 July 1998.